In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 909

THE NEW YORK CENTRAL RAILROAD COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(c)(1) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that those portions of the judgment of the district court from which appellant is here appealing be affirmed.[1]

[1] Appellees, United States of America and Interstate Commerce Commission, are appellants in No. 924, *United States of America and Interstate Commerce Commission* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.* (October Term, 1965, in which other portions of the district court's decision and judgment are being appealed. There are, however, no issues common to both cases (see p. 5, *infra*).

203-523—66

STATEMENT

This case concerns the validity of portions of an Interstate Commerce Commission regulation governing "TOFC" (trailer-on-flatcar) service, also known as piggyback—the movement of truck trailers on railroad flatcars. One of the most common arrangements under which TOFC service is offered to the shipping public is for the rail carrier (or an affiliate) to lease a trailer to the shipper, who loads it and tenders it back to the railroad for flatcar carriage. This arrangement has caused concern due to "the apparent opportunities for rebates and discrimination afforded by" it (J.S., App. B, p. 74).

Rules originally proposed by the Commission would have flatly prohibited this leasing practice (J.S., App. B, p. 70). However, after formal proceedings [2] "encompassing every aspect of TOFC operations" (J.S., App. B, p. 48), the Commission decided against "striking down the prevalent practice of trailer leasing by railroads" (J.S., App. B, pp. 133, 137). Instead, as Rule 7(a) [3] of the series of rules adopted on

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[2] *Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (J.S., App. B).

[3] 49 C.F.R. 500.7(a), which provides:

> Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup and delivery service when such

the basis of these proceedings to ensure that TOFC service would be available to all members of the shipping public on an equal basis and without discrimination, the Commission directed the publication in tariff form of all rates and rules governing the leasing of equipment by a railroad or its affiliate to any person utilizing the railroad's TOFC services. The Commission reserved consideration of more drastic measures, in the hope that the Rule would prove effective in discouraging abuses (J.S., App. B, p. 138).

As the basis for the Rule, the Commission explained that the railroads' practice of integrating the leasing of trailers with its Plan III service[4] is commonplace and widespread (J.S., App. B, pp. 60–65). As an example of how the practice works, it noted that Excelsior Truck Leasing Company, Inc., a wholly owned subsidiary of the Pennsylvania Railroad, owns trailers which it leases on behalf of the railroad to Pennsylvania's Plan III patrons, with the understanding that the trailers may be used only for Plan III TOFC shipments on the Pennsylvania (or on certain other railroads having specific interline arrangements with the Pennsylvania). Under the

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charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

[4] Under Plan III, the railroad carries the trailer over the rail portion of the piggyback movement but does not offer door-to-door pickup or delivery service.

existing practice, there is no publication by the railroad of the charges or terms governing the use of these trailers, nor are they stated in the lease, such matters being the subject only of oral explanation by the railroad's agent (J.S., App. B, pp. 62–63). This failure to publish, the Commission found, permits railroads to offer "what amounts to exactly the same service in a variety of ways" with different costs to the shipper, some published and some not—a "state of affairs [which] places a premium on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment" (J.S., App. B, pp. 135–136)—and contains "potential seeds of discrimination" and "opportunities for abuse" (J.S., App. B, pp. 136, 138).

The three-judge district court upheld both aspects of the Commission's Rule: the requirement of publication of the leasing rates and rules, and the extension of the requirement to the railroads' leasing subsidiaries or affiliates. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 F. Supp. 955 (N.D. Ill.). Noting that Rule 7(a), in the context of the Commission's report, must be interpreted as extending only to the leasing of trailers by a railroad "for use in its own TOFC service, as part of the total transportation service supplied," the court found support for the Rule "in Section 6(1) of the Act, requiring full publication of all charges and privileges or facilities affecting the value of the service rendered to the shipper, and by Section 1(3)(a), defining rail

'transportation' to include the instrumentalities of carriage, irrespective of ownership." 244 F. Supp. at 971.

ARGUMENT

This appeal presents the sole question of the validity of one of several Rules—Rule 7(a)—promulgated by the Interstate Commerce Commission after a comprehensive investigation of piggyback service. Some of these Rules were struck down by the court below and are the subject of other pending appeals (n. 1, *supra*). The court, however, upheld Rule 7(a). The issue of the validity of this particular rule is narrow and severable, and, we submit, presents no substantial question warranting plenary consideration by this Court. Accordingly, this part of the judgment below should be affirmed.

1. Appellant contends that any service, such as the leasing of a trailer, which it performs prior to the tender of the trailer to it for rail shipment is not a transportation service (J.S. 11), and hence that the Commission has no jurisdiction to regulate its leasing arrangements. However, the Commission's Rule extends only to those leasing arrangements where a trailer leased by a railroad or a company controlled by it is used exclusively in conjunction with that railroad's TOFC service (J.S., App. A, p. 42; App. B, pp. 60–65)—a situation in which the leasing of the trailer is plainly an integral part of a transportation service[*]

[*] The Commission held (J.S., App. B, p. 137):

> We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensi-

and hence constitutes the provision of an "instrumentality of carriage" within the meaning of Section 1(3)(a).[5] Piggyback is a mixed rail-truck transporta-

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bly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers non-transportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe will normally be transportation services when offered in connection with TOFC transportation.

[5] *Eastern Central Motor Carriers Assn.* v. *Baltimore & Ohio R. Co.*, 314 I.C.C. 5, sustained *sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp. 318 (W.D. Mo.), affirmed *per curiam*, 379 U.S. 6, is not to the contrary. The court there held only that trailers supplied by shippers (not, as here, by the railroad) for use in conjunction with Plan III service were containers rather than instrumentalities of transportation, and hence that Plan III did not contravene the Interstate Commerce Act's requirement that railroads furnish all the instrumentalities of transportation. 226 F. Supp. at 322. Thus, all that was decided in *Cooper-Jarrett* was that the Interstate Commerce Act does not compel a rail carrier to

tion service. Where the railroad holds itself out not only to perform the rail portion of the service, but to supply the trailer used in the motor portion, the trailer necessarily becomes a part or instrumentality of the transportation service offered, and the entire operation comes within the jurisdiction of the Commission.'

2. Appellant contends that the refusal of the Commission to extend the coverage of Rule 7(a) to motor carriers and freight forwarders contravened the National Transportation Policy (49 U.S.C. preceding Section 1), which requires that regulation of the modes of transportation be "fair and impartial." (J.S. 13–14.) But this contention ignores the Commission's comprehensive rules governing motor carrier equipment leasing, which, among other things, absolutely prohibit motor common carriers from leasing trailers to shippers and require Commission approval of contract carrier rentals (49 C.F.R. 207.6). These rules go far beyond

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offer a complete door-to-door piggyback service. The question of the Commission's power to regulate such a complete service, here offered by the railroad through the leasing device, was not involved. There is an obvious distinction between those instrumentalities which the Interstate Commerce Act *requires* the carrier to furnish, and those instrumentalities which, if furnished voluntarily by the carrier, are deemed to fall within the Commission's regulatory powers.

'*Charges for Use of Trailers*, 49 M.C.C. 272, which appellant cites, held that where a motor carrier leases a truck trailer to a shipper for use in private and rail carriage, the lease of the trailer does not relate to for-hire carriage by the lessor motor carrier and therefore is not subject to regulation. 49 M.C.C. at 274, 275. Here, in contrast, the lease by the rail carrier is exclusively related to the performance of a rail service. At all events, *Charges for Use of Trailers* has been superseded by a rule which prohibits motor carriers' leasing of trailers, as we explain *infra*.

the mere requirement of publication imposed by Rule 7(a).[1] Hence, any attempt to extend the coverage of Rule 7(a), as appellant desires, would, at most, be an attempt "to satisfy some standard of paper equality." *American Trucking Assns.* v. *United States*, 344 U.S. 298, 315.

CONCLUSION

The judgment of the district court, insofar as it upholds Rule 7(a), should be affirmed.

Respectfully submitted.

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[1] To be sure, freight forwarders are not covered by these rules. But the Commission had no evidence before it that there was opportunity for abuse or other basis warranting extending Rule 7(a) to freight forwarders' leasing of trailers.

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